Supreme Court, U. S.
FILED
JAN 6 1976
MICHAEL RODAK, JR., CLERK

Nos. 75-220, 75-221, 75-239, 75-393

In the Supreme Court of the United States

OCTOBER TERM, 1975

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

WILLIE STAMPS, ET AL., PETITIONERS

v.

DETROIT EDISON COMPANY, ET AL.

DETROIT EDISON COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
J. STANLEY POTTINGER,
Assistant Attorney General,
BRIAN K. LANDSBERG,
JESSICA DUNSAY SILVER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ABNER W. SIBAL,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
MARIAN HALLEY,
Attorneys,
Equal Employment Opportunity Commission,
Washington, D.C. 20506.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	9
Conclusion	25

CITATIONS

Cases:	
Board of Education v. *Swann*, 402 U.S. 43	9
Boston Chapter, NAACP, Inc. v. *Beecher*, 504 F. 2d 1017, certiorari denied, 421 U.S. 910	10, 11
Bowe v. *Colgate, Palmolive Co.*, 489 F. 2d 896	17
Carter v. *Gallagher*, 452 F. 2d 315, certiorari denied, 406 U.S 950	10
Chance v. *Board of Examiners*, 458 F. 2d 1167	15
Comstock v. *Group of Institutional Investors*, 335 U.S. 211	16
Contractors Ass'n of Eastern Pennsylvania v. *Secretary of Labor*, 442 F. 2d 159, certiorari denied, 404 U.S. 854	10
Franks v. *Bowman Transportation Co.*, 495 F. 2d 398, certiorari granted, 420 U.S. 989	19
Griggs v. *Duke Power Co.*, 401 U.S. 424	16
Hairston v. *McLean Trucking Co.*, 520 F. 2d 226	24

211-691—75——1

Cases—Continued

	Page
Jersey Central Power & Light Co. v. *IBEW Locals,* 508 F. 2d 687 petition for a writ of certiorari pending, No. 75–182	20
Jones v. *Lee Way Motor Freight, Inc.,* 431 F. 2d 245, certiorari denied, 401 U.S. 954	17, 19
Kirkland v. *New York State Dept. of Correctional Services,* 520 F. 2d 420	10
Local 189, United Papermakers and Paperworkers v. *United States,* 416 F. 2d 980, certiorari denied, 397 U.S. 919	17, 18
Louisiana v. *United States,* 380 U.S. 145	10
Meadows v. *Ford Motor Co.,* 510 F. 2d 939	19
Mitchell v. *DeMario Jewelry, Inc.,* 361 U.S. 288	21
NAACP v. *Allen,* 493 F. 2d 614	10
Northeast Construction Co. v. *Romney,* 485 F. 2d 752	10
Porter v. *Warner Holding Co.,* 328 U.S. 395	21
Quarles v. *Philip Morris, Inc.,* 279 F. Supp. 505	17, 18
Rias v. *Steamfitters Local 638,* 501, F. 2d 622	10
Sabala v. *Western Gillette, Inc.,* 516 F. 2d 1251	24
Southern Illinois Builders Ass'n v. *Ogilvie,* 471 F. 2d 680	10
United States v. *Bethlehem Steel Corp.,* 446 F. 2d 652	17, 20
United States v. *Chesapeake and Ohio Ry. Co.,* 471 F. 2d 582, certiorari denied, 411 U.S. 939	17
United States v. *Georgia Power Co.,* 474 F. 2d 906	20, 21

Cases—Continued

	Page
United States v. *IBEW Local 38,* 428 F. 2d 144, certiorari denied, 400 U.S. 943	10, 11
United States v. *Ironworkers Local 86,* 443 F. 2d 544, certiorari denied, 404 U.S. 984	10
United States v. *Masony Contractors Ass'n of Memphis, Inc.,* 497 F. 2d 871	20
United States v. *N.L. Industries, Inc.,* 479 F. 2d 354	20–21
United States v. *St. Louis-San Francisco Ry. Co.,* 464 F. 2d 301, certiorari denied, 409 U.S. 1116	17
United States v. *United Ass'n of Journeymen,* 364 F. Supp. 808	21
United States v. *Wood, Wire and Metal Lathers, Local 46,* 328 F. Supp. 429, affirmed, 471 F. 2d 408, certiorari denied, 412 U.S. 939	11, 20
Waters v. *Wisconsin Steel Works,* 502 F. 2d 1309	19, 20
Watkins v. *United Steel Workers,* 516 F. 2d 41	20
Statutes:	
Civil Rights Act of 1866, Sec. 1, 42 U.S.C. 1971	4
Civil Rights Act of 1964, Title VII, 78 Stat. 253, 42 U.S.C. 2000e, *et seq.,* and as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. III) 2000e, *et seq.*:	
Sec. 703(j), 42 U.S.C. 2000e–2(j)	10, 14
Sec. 703(h), 42 U.S.C. 2000e–2(h)	16, 18

	Page
Statutes—Continued	
Sec. 706, 42 U.S.C. (Supp. III) 2000e–5	21
Sec. 706(a), 42 U.S.C. 2000e–5(a)	4
Sec. 706(g), 42 U.S.C. (Supp. III) 2000e–5(g)	18
Sec. 707, 42 U.S.C. 2000e–6	3
Sec. 707, 42 U.S.C. (Supp. III) 2000e–6	4, 20, 21
Sec. 707(c), 42 U.S.C. (Supp. III) 2000e–6(c)	4
Sec. 707(d), 42 U.S.C. (Supp. III) 2000e–6(d)	4
Labor-Management Relations Act, 61 Stat. 136, 29 U.S.C. 141, *et seq.*:	
Sec. 1, 29 U.S.C. 151	4
Sec. 301, 29 U.S.C. 185	4
Miscellaneous:	
110 Cong. Rec. (1964):	
Pp. 7206–7207, 7212–7215	17
Pp. 12595, 12722, 14220	21
"Four Agency Agreement", CCH Employment Practices, ¶3775 (1973)	11

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–220

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

No. 75–221

LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

No. 75–239

WILLIE STAMPS, ET AL., PETITIONERS

v.

DETROIT EDISON COMPANY, ET AL.

No. 75–393

DETROIT EDISON COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 77a–103a, 104a–106a)[1] is reported at 515 F. 2d 301. The opinion and order of the district court (Pet. App. 4a–76a) are reported at 365 F. Supp. 87.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1975. Rehearing was denied and the court modified its earlier judgment by order entered May 16, 1975 (Pet. App. 104a–106a). The petitions for a writ of certiorari were filed on the following dates: No. 75-220 on August 11, 1975; No. 75–221 on August 13, 1975; No. 75–239 on August 14, 1975; No. 75–393 on September 12, 1975 (pursuant to an order issued by Mr. Justice White extending the time for filing until September 15, 1975). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1.(a) Whether a district court, upon a finding that an employer engaged in racially discriminatory hiring and promotion practices, may properly fashion a remedy that provides for race-conscious hiring and promotion of qualified persons.

(b) Whether the district court's order in this case, insofar as it provided for such race-conscious hiring and promotion, was consistent with applicable statutory and constitutional proscriptions of racial discrimination.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 75–393.

2.(a) Whether the court of appeals correctly sustained the district court's finding that the existing departmental seniority system at issue in this case perpetuates the effects of past discrimination in hiring and assignment.

(b) Whether, on the basis of that finding, the district court properly ordered that employees who are members of the affected class be allowed to bid for jobs on the basis of their companywide, rather than departmental, seniority.

3.(a) Whether, upon a finding of unlawful employment discrimination in a suit brought by the government pursuant to Section 707 of the Civil Rights Act of 1964, a district court may properly award back pay to the identified victims of that discrimination.

(b) Whether the court of appeals correctly defined the class of individuals who were eligible to be considered for back pay awards.

(c) Whether the court of appeals adopted a proper test for determining individual entitlement to back pay.

4. Whether the court of appeals correctly upheld the district court's finding that Local 223, Utility Workers Union of America, engaged in unlawful employment practices.

STATEMENT

This is a consolidation of two actions alleging racial discrimination in employment practices against Detroit Edison Company, a public utility, and two union locals which are the collective bargaining rep-

resentatives of some Detroit Edison employees—Local 223, Utility Workers Union of America,[2] and Local 17, International Brotherhood of Electrical Workers (Pet. App. 78a).[3] Three black employees of Detroit Edison brought a class action in May 1971 claiming violations of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. 2000e, *et seq.*, Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1981, and Sections 1 and 301 of the Labor-Management Relations Act, 61 Stat. 136, 156, 29 U.S.C. 151, 185.[4] In June 1972, the United States brought suit under Section 707 of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. III) 2000e–6, alleging a pattern and practice of violation of the rights protected by Title VII.[5]

After a lengthy trial, the district court found, on the basis of "overwhelming" evidence, that "invidious racial discrimination in employment practices permeates the corporate entity" of Detroit Edison (Pet. App. 13a) and that such discrimination "has been deliberate and by design" (*id.* at 14a). The court found that the company had discriminated in hiring,

[2] Local 223 represents approximately 4,000 employees in various job classifications, grouped in approximately 28 bargaining units (Pet. App. 18a).

[3] Local 17 represents approximately 800 employees, almost all of whom are in a single bargaining unit (Pet. App. 18a; Local 17 Pet. 4).

[4] The class action was instituted pursuant to Section 706(a) of Title VII after the filing of a charge with the Equal Employment Opportunity Commission in January 1971 by petitioner Stamps (Pet. App. 99a).

[5] After judgment, the Equal Employment Opportunity Commission was substituted as plaintiff in the government action, pursuant to Section 707(c) and (d).

placement, and promotion practices (*id.* at 56a–62a). By use of various discriminatory means (*id.* at 20a–21a, 29a–37a), the court found, the company had hired, as of April 1972, only 832 blacks out of a work force of 10,630 (*id.* at 24a). Of the approximately 1,100 supervisory positions, only 12 were held by blacks (*ibid.*)

The district court found that blue collar jobs at Detroit Edison could be classified as high opportunity or low opportunity, with high opportunity jobs characterized by higher wage rates and better working conditions (*id.* at 23a–24a).[6]

With respect to discrimination in placement and promotion, the court found that, through various means (*id.* at 29a–30a, 31a–37a, 40a), blacks were denied high opportunity jobs. Although the company claimed to follow a practice of hiring untrained and inexperienced employees and training them for better jobs (*id.* at 45a–46a), "[h]igh opportunity jobs have been and remain nearly all white" (*id.* at 24a). In many cases, the court found, blacks with "work experience and education superior to that of white employees" in high opportunity jobs "were assigned to and refused transfer from low-opportunity jobs" (*id.* at 21a).[7] Moreover, blacks were generally ex-

[6] Low opportunity jobs include janitor, porter, elevator operator, and plant cleaner (Pet. App. 19a). The highest wage rate for low opportunity jobs is $4.32 per hour, while that is the starting rate for some high opportunity jobs (*id.* at 23a–24a).

[7] The company offered no evidence that whites assigned to high opportunity jobs were better qualified than blacks placed in low opportunity jobs (Pet. App. 45a).

cluded from any jobs in departments or smaller units within a department that had high opportunity jobs (*id.* at 19a, 23a–28a).

The company's work force is divided into departments, which are further divided into bargaining units and, finally, into occupational groups. Collective bargaining agreements with the defendant unions, and company policy with respect to some employees not within a bargaining unit, provide for a system of job posting that gives preference in bidding on vacancies within a department or smaller unit to workers in that department or unit (*id.* at 58a).[8] The district court found that this system largely denies to blacks, who were not initially assigned to departments with high opportunity jobs, the opportunity to bid on such jobs (*id.* at 39a).

The seniority system, provided for in collective bargaining agreements and by company policy (*id.* at 58a), further limits the access of blacks to high opportunity jobs. Seniority for purposes of promotion, transfer, and other employment decisions is based on length of service in an employee's occupa-

[8] The collective bargaining agreement negotiated by Local 17 provides for posting of vacancies within the department in which they occur. Only if a vacancy is not filled from within the department is it posted companywide. Preference is given to those within the bargaining unit in which the vacancy occurs (Pet. App. 37a–38a). The agreement with Local 223 provides for posting of vacancies within an occupational group. If a vacancy is not filled within the group, it is posted within the bargaining unit, and then within the department. If it is still unfilled, it is posted companywide (*id.* at 39a). An employee cannot bid on a job not posted in his group, unit, or department.

tional group or department (*id.* at 37a, 39a).[9] Promotions within an occupational group, bargaining unit, or department are, as a general rule,[10] awarded to the bidding employee with the most seniority within that group, unit, or department who possesses the required "skills, abilities and/or adaptability" (*id.* at 37a–39a). If an employee bids successfully on a vacancy in another department, he cannot carry with him any of the seniority he has previously acquired, and he must accept a wage rate that may be less than his current rate (*id.* at 38a, 39a).

The district court found that the seniority system discourages transfers of blacks to departments with high opportunity jobs and denies them the same advancement opportunities enjoyed by whites with equal company seniority (*id.* at 38a, 39a–40a), thus "locking" blacks into low opportunity jobs and restricting their advancement (*id.* at 53a). The court concluded that discrimination in placement was perpetuated by the systems of job posting and seniority (*ibid.*).

The district court also found that, by acquiescing in Edison's discriminatory practices and by knowingly entering into collective bargaining agreements

[9] A system of departmental seniority credits time worked in a department or smaller unit, in contrast with a system of employment or company seniority, which credits total time employed by the company in any department.

[10] There is one exception. When there is a vacancy in a job covered by the collective bargaining agreement with Local 223, which is posted outside the bargaining unit, the measure of seniority is company seniority (Pet. App. 39a).

that perpetuated the effects of those practices, the unions had failed to represent the interests of their black members (*id.* at 39a–40a, 41a, 55a). Moreover, Local 223 was found to have engaged in affirmative acts of discrimination (*id.* at 40a–41a, 55a).

The district court concluded that all three defendants had engaged in unlawful employment practices (*id.* at 56a–57a, 58a, 59a). The court enjoined the discriminatory practices (*id.* at 66a–67a) and ordered affirmative relief for the "affected class" (*id.* at 67a), including back pay (*id.* at 69a–70a) and provision for transfer to departments and units that have high opportunity jobs, with retention of seniority and wage rate (*id.* at 68a–69a). The relief incorporated race-conscious numerical goals for hiring, for promotion to supervisory positions, and for placement in high opportunity lines of progression (*id.* at 70a–72a). The district court also awarded punitive damages against Edison and Local 223 and attorneys fees against all three defendants (*id.* at 74a, 75a). A committee was established to aid in the resolution of issues respecting the decree, and the court retained jurisdiction to resolve such issues (*id.* at 73a) and to grant additional necessary and appropriate relief (*id.* at 76a).

The court of appeals held that the district court's findings were supported by the evidence, and it affirmed the district court's conclusions of law respecting unlawful discrimination by the three defendants (Pet. App. 92a–95a). The award of punitive damages was reversed (*id.* at 83a–86a). The court of appeals upheld the affirmative relief with some modifications, and it remanded for further proceedings (*id.* at 103a).

ARGUMENT

1. The district court established goals for the hiring of qualified blacks and for the advancement of qualified blacks into high opportunity jobs and supervisory positions. Edison was ordered to "recruit and endeavor to hire black applicants for all positions within the Company on an accelerated basis with the goal of having a number of blacks employed by the Company at 30% of its total work force" (Pet. App. 70a). A goal of 25 percent blacks was established for specified high opportunity jobs and lines of progression, with future vacancies to be filled on the basis of three blacks for every two whites (*id.* at 71a). The court ordered that supervisory vacancies be filled on the basis of one senior black employee for every white (*id.* at 72a). The court of appeals remanded for the setting of a percentage goal or time limitation which, when reached, would terminate the obligation of ratio promotion of supervisors (*id.* at 102a).

Petitioners condemn the hiring and promotion goals sustained by the court of appeals as racial classifications, arguing that such racially-conscious relief is constitutionally barred (Edison Pet. 9–11; Local 17 Pet. 10). Race-consciousness, however, is not prohibited. Courts faced with proof of racial discrimination are not required to be "color blind," but may properly employ numerical racial standards as "starting points" in effecting relief from such discrimination. *Board of Education* v. *Swann*, 402 U.S. 43, 45–46. In cases of proven employment discrimination, a race-conscious numerical goal provides both a means of assuring that relief will be effective, by shifting

to the employer the burden of taking affirmative steps to remedy unlawful practices, and an objective standard for measuring progress toward that end. See *NAACP* v. *Allen*, 493 F.2d 614 (C.A. 5). Relief of this sort has been upheld by nine courts of appeals.[11]

Contrary to petitioner Detroit Edison's assertions (Pet. 10–12), the goals in this case were not established merely to assure blacks proportional representation in employment. Rather, in the face of strong proof of racial discrimination, the courts below chose to establish goals as a means of eliminating the effects of past discrimination, as well as preventing future unlawful activities. See *Louisiana* v. *United States*, 380 U.S. 145, 154. Section 703(j), designed to prevent preferential treatment for blacks on the basis of racial

[11] See, *e.g.*, *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (C.A. 1), certiorari denied, 421 U.S. 910; *Rios* v. *Steamfitters Local 638*, 501 F.2d 622 (C.A. 2); *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (C.A. 3), certiorari denied, 404 U.S. 854; *NAACP* v. *Allen*, *supra*; *United States* v. *IBEW Local 38*, 428 F.2d 144 (C.A. 6), certiorari denied, 400 U.S. 943; *Southern Illinois Builders Ass'n* v. *Ogilvie*, 471 F.2d 680 (C.A. 7); *Carter* v. *Gallagher*, 452 F.2d 315 (C.A. 8) (*en banc*), certiorari denied, 406 U.S. 950; *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (C.A. 9), certiorari denied, 404 U.S. 984; *Northeast Construction Co.* v. *Romney*, 485 F.2d 752 (C.A.D.C.).

Kirkland v. *New York State Dept. of Correctional Services*, 520 F.2d 420 (C.A. 2), relied upon by petitioner Detroit Edison (Pet. 11), is not inconsistent with this line of cases. In *Kirkland*, the court of appeals declined to impose numerical relief because of insufficient proof of widespread discrimination in the past (520 F.2d at 428). Other cases decided by that court were distinguished on the ground that in those cases, as here, there was a "clear-cut pattern of long-continued and egregious racial discrimination" and no evidence of reverse discrimination (*id.* at 427).

imbalance alone, does not prohibit a court from establishing race-conscious goals. *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 504 F.2d at 1028; *United States* v. *Wood, Wire and Metal Lathers, Local 46*, 471 F.2d 408, 413 (C.A. 2), certiorari denied, 412 U.S. 939; *Southern Illinois Builders Ass'n* v. *Ogilvie*, *supra*, 471 F.2d at 684–686; *United States* v. *IBEW Local 38*, *supra*, 428 F.2d at 149.

2. Although some form of numerical relief may thus properly be ordered in a case like this one, the provisions of the particular decree in this case may be potentially troublesome depending upon the manner in which the district court resolves on remand certain ambiguities in the decree. The existence of those ambiguities, to which we will advert shortly, makes this an inappropriate stage of the litigation to consider the statutory and constitutional limitations on race-conscious hiring and promotion relief to remedy proven employment discrimination.

The general policy of the federal government with respect to race-conscious hiring and promotion remedies is expressed in a March 23, 1973, memorandum (commonly known as the "Four Agency Agreement") which is reproduced at CCH Employment Practices, ¶3775. The memorandum represents a statement of policy developed jointly by the Equal Employment Opportunity Commission, the Department of Justice, the Civil Service Commission, and the Department of Labor's Office of Federal Contract Compliance, as a uniform guide for use by each agency concerning equal employment opportunity matters in state and local government personnel systems. The principles

reflected in the memorandum are equally applicable to analogous situations in the private sector.

The memorandum states that identifiable individual victims of employment discrimination should be given priority consideration for new vacancies to restore them to the positions they would have been in but for the discrimination (*id.*, p. 2063–4). Moreover, "it may be appropriate for a court to order an employer to make a good faith, nondiscriminatory effort to meet goals and timetables where a pattern of discriminatory employment practices has been found" (*ibid.*). The memorandum distinguishes between "permissible goals on the one hand and impermissible quotas on the other" (*ibid.*). A quota requires the hiring or promotion of a fixed number or percentage of a designated class "regardless of the number of potential applicants who meet necessary qualifications"; it thus "requires that considerations of relative abilities and qualifications be subordinated to considerations of race, religion, sex or national origin in determining who is to be hired, promoted, etc." (*ibid.*).

"A goal, on the other hand, is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market" (*ibid.*). An employer would not be subject to sanction for failure to meet a goal, if, for example, he has fewer vacancies than expected or if, despite his good faith efforts, he has not been able to include in the group of persons considered for selection a sufficient number of persons from the group previously discriminated against (*ibid.*). Nor would he be required to

hire or promote an unqualified person in preference to a qualified person, or a less qualified person in preference to a better qualified person, "provided that the qualifications used to make such relative judgments realistically measure the person's ability to do the job in question, or other jobs to which he is likely to progress" (*ibid.*). But, "where there has been a history of unlawful discrimination, if goals are set on the basis of expected vacancies and anticipated availability of skills in the market place, an employer should be expected to meet the goals if there is an adequate pool of qualified applicants from the discriminated against group from which to make selections; and if the employer does not meet the goal, he has the obligation to justify his failure" (*id.*, p. 2063–5).

The district court's decree, as modified by the court of appeals, contains several ambiguities that make it difficult to determine whether its provisions are entirely consistent with these principles. Apart from provisions properly designed to compensate the identifiable individual victims of the prior employment discrimination (Pet. App. 65a–70a), the order establishes a general goal of increasing the number of black employees to 30 percent of the total work force "[s]ubject to the availability of qualified applicants" (*id.* at 70a). The court of appeals imposed a similar condition on the provision requiring that promotions to foreman be made on the basis of one black for each white employee promoted (*id.* at 72a, 102a). The provision requiring that hiring for and promotion in high opportunity jobs be on the basis of three blacks for every

two whites until 25 percent of the employees in those jobs are black is not explicitly conditioned on the availability of qualified persons (see *id.* at 71a). Although we assume that it will be so construed by the district court, the effect of the provision is unclear at the present stage. It is also unclear whether the order will permit the hiring of better qualified persons regardless of race or whether the goals will nonetheless have to be met if there is a sufficient number of minimally qualified black applicants.[12]

The provision establishing hiring and promotion goals for high opportunity jobs and lines of progression (*ibid.*) does not indicate what weight company seniority may be given in selecting persons for promotion. If the order were construed to require compliance with the three-for-two promotion requirement without regard to relative seniority of white and black employees, it might exceed the bounds of "rightful place" relief by preferring blacks over whites for promotion solely on the basis of their race. See Section 703(j) of the Act, 42 U.S.C. 2000e–2(j).[13]

The validity of the decree as a proper remedy for proven racial discrimination in employment practices cannot, in our view, adequately be determined in its present abstract form. It may be read in a way that

[12] The difference would be significant only if the basis for distinguishing better from lesser qualified persons realistically reflects ability to do the job (see p. 13, *supra*).

[13] The same ambiguity is present in the provision requiring one-for-one promotion to foreman or supervisor (Pet. App. 72a). That provision, moreover, contains no limitation in terms of time or percentage, and the court of appeals directed the district court to fix such a limitation on remand (Pet. App. 102a).

appears consistent with what we view as the applicable statutory and constitutional principles, but it may also be read in a way that would make it inconsistent with those principles. Although the propriety of race-conscious hiring and promotion remedies for employment discrimination may well warrant consideration by this Court, that consideration, we believe, should await a case in which the full contours of the remedial order have been spelled out unambiguously in the terms of the decree or have been fleshed out by the district court by application to concrete situations. The present order, at this stage of the litigation, meets neither standard.[14]

The district court has established a procedure for clarifying the ambiguities inherent in its order and has retained jurisdiction for that purpose (Pet. App. 73a, 76a). In light of the unanswered questions regarding implementation of that order and the district court's intention to deal with those questions, further review at this time would be premature.

3. The district court found that the seniority system, although neutral on its face, operated to "perpetuate the effects of past discrimination in assignment" (Pet. App. 58a). Local 223 contends that that finding, upheld by the court of appeals, is clearly erroneous (Local 223 Pet. 7). Further review of this

[14] Petitioners challenge the particular percentage figures established by the district court as goals and the ratios adopted by the court for reaching those goals within a reasonable period of time (Edison Pet. 14–15; Local 17 Pet. 10–11). But these are essentially factual questions (see *Chance* v. *Board of Examiners*, 458 F. 2d 1167 (C.A. 2)) that do not, by themselves, warrant review by this Court.

factual determination is unwarranted. See *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214. In view of the discriminatory assignment of blacks to low opportunity jobs, a seniority system that requires an employee to forfeit his seniority and wage rate if he transfers to another job perpetuates that discrimination by discouraging blacks from transfering to departments with high opportunity jobs and by denying those who do transfer an equal opportunity to advance.

Petitioner unions argue that the seniority system is neutral, applying equally to whites and blacks, and is, therefore, a *bona fide* system which may not be disturbed by the courts (Local 223 Pet. 8; Local 17 Pet. 13). They apparently rely upon Section 703(h), which provides that

> it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate because of race * * *.

It is well settled that a *bona fide* seniority system within the meaning of Section 703(h) must be more than facially neutral.[15] A seniority system which tends

[15] As the court of appeals recognized (Pet. App. 95a), an intentionally adopted employment practice which operates to discriminate is not saved from illegality by a mere neutral purpose which does not qualify as business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432. Significantly, petitioners do not contend that preservation of the seniority system is compelled by business necessity.

to deny black employees equal access to traditionally "white jobs" to which they were not assigned because of their race, and which makes seniority in such jobs the controlling requirement for promotion, is unlawful under Title VII. *Quarles* v. *Philip Morris, Inc.,* 279 F. Supp. 505 (E.D. Va.); *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *United States* v. *Bethlehem Steel Corp.,* 446 F. 2d 652 (C.A. 2); *United States* v. *Chesapeake and Ohio Ry. Co.,* 471 F. 2d 582 (C.A. 4), certiorari denied, 411 U.S. 939; *Bowe* v. *Colgate, Palmolive Co.,* 489 F. 2d 896 (C.A. 7); see also *United States* v. *St. Louis-San Francisco Ry. Co.,* 464 F. 2d 301 (C.A. 8), certiorari denied, 409 U.S. 1116; *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F. 2d 245 (C.A. 10), certiorari denied, 401 U.S. 954.[16]

Moreover, the differences in terms and conditions of employment applicable to workers in high and low opportunity jobs, as they operate to preclude blacks from advancement in high opportunity jobs, are differences which result from discrimination on the basis of race, within the meaning of the proviso to Section

[16] These cases involve discrimination prior to the effective date of Title VII, which discrimination was perpetuated after that date by a seniority system. The legislative history of Title VII reflects an intention to protect seniority lists existing on the effective date of the Act. See the Department of Justice and Clark-Case interpretive memoranda placed in the record by Senator Clark (110 Cong. Rec. 7206–7207, 7212–7215 (1964)). Where, as here, discriminatory assignment occurred after the Act's effective date, there is additional reason for taking steps to eliminate the effects of that discrimination.

703(h), and therefore are not protected by that section. *Local 189, United Papermakers and Paperworkers* v. *United States, supra,* 416 F. 2d at 995; *Quarles* v. *Philip Morris, Inc., supra,* 279 F. Supp. at 577. For this reason, even if operation of the company's seniority system were not itself an unlawful employment practice, the relief approved by the court of appeals would be appropriate as an exercise of the broad remedial powers authorized by Section 706(g) to afford effective relief from the concededly discriminatory assignment practices of Edison.

The relief approved by the court of appeals did not eliminate the existing seniority system. It simply made provision for qualified [17] class members to be given an opportunity to attain their rightful place within that system. The district court order, as modified by the court of appeals, permits all qualified blacks employed by Edison in low opportunity jobs to effectuate a "single transfer" [18] to another job, within five years from the effective date of the order. Upon transfer, class members retain their existing wage rate and are credited with company seniority, as if it were seniority in a department or smaller unit (Pet. App. 68a–69a, 101a–102a). Relief of this nature has generally

[17] The district court's order recognizes a qualification requirement, since it contemplates that a class member may be returned to the department from which he transferred because of disqualification (Pet. App. 68a–69a) and that he may be required to take a position which provides training necessary to advancement (*id.* at 68a).

[18] If that transfer does not work out, the employee has two additional opportunities to transfer (Pet. App. 68a–69a).

been granted in like situations. See cases cited *supra,* p. 17.

Contrary to petitioner's contentions (Local 223 Pet. 8, 9–10), the court's order does not give "super seniority" to members of the affected class, nor does it discriminate against whites. Under the order, no class member will be credited with seniority he has not earned.[19] Since class members will be permitted to transfer only to jobs for which they are qualified, they are not being preferred over whites who hold high opportunity jobs. To the extent that whites' seniority expectations are defeated, they are "unearned expectations" based, not upon greater seniority, but upon a discriminatory assignment system. *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309 (C.A. 7).

The order respecting transfer from low opportunity jobs is properly limited to black employees. Whites hold low opportunity jobs either because they chose not to apply for high opportunity jobs or because they were not qualified for them. Race was not the determinative factor in their assignment, and relief designed to undo the effects of racial discrimination need not include them. See *Jones* v. *Lee Way Motor Freight, Inc., supra,* 431 F. 2d at 249.

Petitioners argue that the relief is improper because it extends to some who were not victims of dis-

[19] The issue of fictional or constructive seniority is not presented here. Thus, the cases cited by petitioner Local 17—*Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398 (C.A. 5), certiorari granted, 420 U.S. 989, and *Meadows* v. *Ford Motor Co.*, 510 F. 2d 939 (C.A. 6)—are inapposite.

crimination (Local 223 Pet. 9; Local 17 Pet. 13). Some blacks presumably would have been assigned to low opportunity jobs even in the absence of discrimination. Since there is no way to single out those individuals, and since petitioners have suggested none, full relief can be afforded only by applying the remedy to all presently qualified black employees assigned to low opportunity jobs. *United States* v. *Bethlehem Steel Corp., supra,* 446 F. 2d at 660.[20]

4. Contrary to petitioner Edison's assertion that the government cannot sue for back pay in an action brought under Section 707 (Edison Pet. 19–21), it is settled that that Section authorizes such awards. *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 920 (C.A. 5); *United States* v. *Masonry Contractors Ass'n of Memphis, Inc.*, 497 F. 2d 871, 876 (C.A. 6); *United States* v. *Wood, Wire and Metal Lathers Local 46,* 328 F. Supp. 429, 441 (S.D. N.Y.), affirmed, 471 F. 2d 408 (C.A. 2), certiorari denied, 412 U.S. 939; see *United States* v. *N. L. Industries,* Inc., 479

[20] Petitioner Local 223 cites three cases in arguing that there is a conflict of authority: *Jersey Central Power & Light Co.* v. *IBEW Locals*, 508 F. 2d 687 (C.A. 3), petition for a writ of certiorari pending, No. 75–182; *Watkins* v. *United Steel Workers*, 516 F. 2d 41 (C.A. 5); *Waters* v. *Wisconsin Steel Works*, *supra* (Local 223 Pet. 8–9). These cases involve issues different from those in the instant case, as two of the courts recognized. *Waters* v. *Wisconsin Steel Works*, 502 F. 2d at 1320; *Watkins* v. *United Steel Workers*, 516 F. 2d at 46. In each, the court rejected the argument that newly hired employees, who had not themselves suffered discrimination, should be given fictional company (as distinguished from departmental) seniority because others in the same minority group had suffered discrimination in the past.

F. 2d 354 (C.A. 8). The legislative history of Section 707 supports that construction.[21]

Petitioner cites a single district court case—*United States* v. *United Ass'n of Journeymen,* 364 F. Supp. 808 (D. N.J.) in support of its position that back pay is unavailable (Edison Pet. 20). The court in that case ruled that the Attorney General could not sue for back pay under Title VII as originally enacted, but it suggested that such relief might be available in actions, like the present one, brought after the effective date of the 1972 Amendments to Title VII (*id.* at 832).

Specific provision for back pay relief under Section 706 does not preclude the award of such relief under the more general provisions of Section 707. In the absence of a clear legislative prohibition, a limitation on the authority of a court of equity to order full relief should not be implied. See *Porter* v. *Warner Holding Co.,* 328 U.S. 395; *Mitchell* v. *DeMario Jewelry, Inc.,* 361 U.S. 288.[22]

[21] See *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 920 (C.A. 5), citing 110 Con. Rec. 12595 (remarks of Senator Clark), 12722 (remarks of Senator Humphrey), 14220 (remarks of Senator Holland).

[22] The 1972 Amendments gave the Attorney General and the EEOC authority to bring suit under Section 706, which provides for back pay relief in individual instances of discrimination. Section 707 was amended to provide that actions brought under that Section are to be "conducted in accordance with the procedures set forth in section [706]." As the Fifth Circuit stated in *United States* v. *Georgia Power Co., supra*, 474 F. 2d at 920, it would be "incongruous" to assume "that Congress would have thought it appropriate to give the EEOC and the

5. The court of appeals ruled that all black employees were eligible to be considered for back pay but that each individual had to establish his entitlement before an award would be made (Pet. App. 97a).[23] By doing so, the court did not, as petitioner Detroit Edison contends (Pet. 16), permit awards of back pay to employees who have not suffered discrimination. The district court found pervasive discrimination against blacks and discriminatory transfer and promotion policies (Pet. App. 13a, 21a, 26a, 37a). There was some evidence of discrimination against blacks in high opportunity jobs (*id.* at 22a). At most, the court of appeals' judgment would permit those subject to that pervasive discrimination to demonstrate entitlement to back pay by showing that they did not get jobs for which they were qualified. It is clear from the court of appeals' opinion that it did not intend to compensate those who had not suffered discrimination, and there is no reason to believe that the district court will do so.

Petitioner's further contention, that the class eligible for back pay relief should have excluded former employees not employed within 210 days prior to the filing with the EEOC of the Stamps charge, is not

Attorney General authority to sue for back pay under Section 706 but not in cases involving the more serious Section 707 problems."

[23] The court of appeals limited the class by requiring proof of entitlement, since the district court order would have awarded back pay to all black employees in low opportunity jobs, according to a formula, and without a further showing of entitlement (Pet. App. 67a, 69a–70a).

properly presented for review since it was not raised in the court of appeals. Moreover, there is nothing in the court of appeals' opinion to indicate that such individuals are to be included in the class eligible for back pay.[24]

6. Both petitioner Edison and petitioner Stamps challenge the test adopted by the court of appeals for establishing entitlement to back pay (Edison Pet. 17–18; Stamps Pet. 12–16). Each attaches a different meaning to the requirement that an employee seeking back pay must show that "he indicated a desire to transfer to a vacant job" (Pet. App. 106a). Because the requirement is subject to various interpretations, we believe that review at this time would be premature. Since the court of appeals opinion does not specify how or to whom an employee must have indicated a desire to transfer, the district court will have to answer those questions in applying the test.[25] It is

[24] The court of appeals' statement that "there *may* be former employees who have left the service of Edison and who should participate in the back-pay provisions" (Pet. App. 97a; emphasis added) cannot fairly be read to require the granting of back pay to all former employees regardless of individual circumstances.

[25] We have some concern that the court of appeals' test may be read to preclude the award of back pay relief to a victim of discrimination who did not indicate his desire to someone in a position of authority in the company or one of the unions. Under the circumstances of this case, where an effort to transfer would have been futile and where black employees would not have thought it reasonable to make such an effort, they should not be required to have indicated a desire in that fashion. If the test were construed to impose that requirement, it would conflict with decisions holding that entitlement to back

entirely possible that the district court's implementation of the test will be acceptable to all parties. In any event, meaningful review can be obtained only on a fuller record.

Greater definition is also needed of the requirement that the employee show that "the position was filled by someone possessing the qualifications of the applicant or someone less qualified" (*ibid.*). Given the invalidation of the tests previously used by Detroit Edison (*id.* at 60a–62a), it is not clear what proof the district court will require to demonstrate comparative qualifications.

7. Local 223 argues that it complied with its obligation to represent its black members and therefore that it did not violate Title VII. The district court found that, in addition to acquiescing in the unlawful employment practices of Detroit Edison and negotiating a collective bargaining agreement that operated to continue the effects of that discrimination (Pet. App. 55a), Local 223 engaged in a number of discriminatory practices (*ibid.*). Those practices included (1) discouraging the filing of grievances by black employees and misinforming blacks regarding the unavailability of the grievance procedure to challenge unsuccessful interdepartment job bids (*id.* at 40a),

---

pay cannot be conditioned on prior attempts to transfer to a "white" job when such attempts would have been futile. See, *e.g.*, *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1256 (C.A. 5); *Hairston* v. *McLean Trucking Co.*, 520 F. 2d 226 (C.A. 4). Since we believe that the opinion is subject to less burdensome interpretations, however, we do not believe that review would be appropriate at this time.

(2) deliberately gerrymandering seniority districts to deny promotional opportunities to blacks (Pet. App. 41a), (3) requiring adherence to seniority rules for blacks given undesirable positions, when the same requirements had not been imposed on whites (*id.* at 40a–41a), and (4) denying blacks positions of authority in the union (*id.* at 41a). There was no error in concluding on the basis of these findings, which were upheld on appeal, that Local 223 had not adequately represented the interests of its black members.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.
BRIAN K. LANDSBERG,
JESSICA DUNSAY SILVER,
Attorneys.

ABNER W. SIBAL,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
MARIAN HALLEY,
Attorneys,
Equal Employment Opportunity Commission.

JANUARY 1976.

U.S. GOVERNMENT PRINTING OFFICE 1976